BRIEF IN SUPPORT OF PETITION.

Official Reports of Opinions Below.

District Court:

Opinion in Support of Dismissal of Count against Home Indemnity Co ..... 32 F. Supp. 297
Opnion in Support of Judgment n. o. v. 42 F. Supp. 672
Opinion in Support of Order Granting Petitioner's Motion for Simultaneous Disposition of Both Branches of Respondent's Motion under Rule 50(b) 42 F. Supp. 677
Opinion in Support of Grant of Alternative Motion for New Trial ..... 42 F. Supp. 678

Circuit Court:

Opinion in Support of Dismissal of Petitioner's Appeal 132 F. 2d ——

Jurisdictional Statement and Statement of the Case.

These statements are made in the petition as required by the applicable rule of court.

Summary of Argument.

The decision of the Circuit Court below deprived petitioner of its procedural rights. Petitioner is entitled to a decision on the merits of its appeal to that Court.

The appealed judgment n.o.v. was not automatically vacated by the alternative new trial grant. Petitioner did not appeal from the new trial grant. In its appeal from the judgment n.o.v., petitioner is entitled to a review of its allegation that the new trial grant was based solely upon incorrect reasons of law, in the event the entry of the judgment n.o.v. is found erroneous.

Under the purpose, operative effect, and permissible scope of Civil Procedure Rule 50(b), as already expounded,

or actually intended if not yet clearly decided, petitioner is entitled to a restoration of its verdict and judgment if, upon a review of the appealed judgment n.o.v. and of the challenged reasons of law which allegedly constitute the sole support of the alternative grant of new trial, as well as of any trial errors asserted by respondent, the reviewing court concludes the verdict to find support in the evidence and the trial to be otherwise free from trial error harmful to respondent.

The case is presently susceptible of final determination, and the circumstances are such as to justify a full hearing upon the merits of the appeal by this Court in exercise of its prerogative in that regard.

Argument.

(1) We contend that the grant of the alternative motion for new trial was not required to be expressly conditioned to become effective only upon reversal of the judgment on appeal. Such a condition is implied by law. We believe this to be the clear implication of the opinion of this Court in *Montgomery Ward & Co.* vs. *Duncan*, 311 U. S. 243, and that the Circuit Court went far astray in its conclusion to the contrary.

None of the cases cited in the opinion of the Circuit Court is in point. Procedure in state courts is in no wise here involved. Nor are federal decisions made prior to the promulgation of the Rules of Civil Procedure. The Pennsylvania cases cited are particularly inapplicable. They either relate to the effect of a grant of new trial upon a judgment entered on a verdict or deal with the construction of the Pennsylvania judgment n.o.v. act. The question here concerns the effect intended by this Court to be given the grant of an alternative motion for a new trial when such a grant is made at the same time a judgment is entered

under Rule 50(b). We believe that the *Montgomery Ward* case sufficiently discloses the intention of this Court to be that such a grant has no effect whatsoever except upon a reversal of the judgment.

We contend, therefore, that the decision of the Circuit Court decided a federal question in a way probably in conflict with an applicable decision of this Court and that certiorari should be granted.

(2) Civil Procedure Rule 73(a) prescribes the manner in which an appeal is to be taken. Rule 73(b) requires the notice of appeal to designate the judgment o part thereof appealed from. Rule 75(d) requires a statement of points relied upon,—a *quasi* assignment of asserted errors.

Petitioner's notice of appeal designates the final judgment of November 15, 1941, as the judgment appealed from. There is no designation of the new trial order as a judgment appealed from. The reference thereto is merely a statement of an asserted claim of a procedural right to a review thereof in the appeal from the final judgment,—a mere advance notice that petitioner's statement of points relied upon would, as they did, raise the question of its reviewability in event of a reversal of the appealed judgment. Perhaps the statement was unnecessary surplusage. But it did no harm to respondent or to anyone else, including both trial and appellate courts. And it did not constitute an appeal from the new trial order and was obviously not intended as such.

The Circuit Court was in error when, by its final order of January 22, 1943, it dismissed an appeal by petitioner from the new trial order, for the simple and plain reason that no such appeal was before it. And it was equally in error when it entered its order of June 2, 1942, for the equally simple and plain reason that the question of the reviewability of the new trial order was not then before it

and could not be reached unless and until it reversed the appealed final judgment.

The inference is legitimate and fair that when the Court entered its order of June 2, 1942, it then and there determined upon the course later pursued when, on January 22, 1943, it held the appealed judgment to be non-existent by reason of the new trial order. If the Court is right in that conclusion, the entry of the order of June 2, 1942, is inconsequential. But if the Court is wrong in that conclusion, its final order of January 22, 1943, as in dismissal of an appeal from the new trial order, becomes decidedly consequential. The question then is what petitioner intended by its "further notice". Does it constitute an appeal from an order for new trial and, hence, not within the statutory jurisdiction of the Circuit Court? Or does it constitute merely what we contend it to be?

In deciding, as it did by this final order of January 22, 1943, that this "further notice" constituted an appeal, the Circuit Court decided a question of federal law which has not been, but should be, decided by this Court.

(3) From what this Court said in the *Montgomery Ward* case in explanation of the purpose of Civil Procedure Rule 50(b) and the proper scope of its administration by the courts, we contend that this Court intends the rule to make an order for new trial effective only upon a reversal of a judgment therewith entered and *also only* upon a determination of the rectitude of the new trial order if it was granted solely for asserted trial errors. Otherwise, the rule would not serve its announced purpose "of speeding litigation and preventing unnecessary retrials", nor would the courts be administering the rule so as "to accomplish all that is permissible under its terms" in obedience to this Court's admonition.

In the cited case, this Court carefully distinguished new trial reasons appealing to the discretion of the trial judge

from those asserting errors committed at trial. Reasons falling within the first category represent decisions of fact which are peculiarly for the trial court and, under the fundamental principle relating to decisions on matters of fact by a court of first instance, they must stand unless, upon extrinsic grounds, they are clearly in abuse of judicial discretion. On the other hand, reasons asserting trial errors are matters of law as to which no judicial discretion exists, and they may not stand unless they are legally correct.

In the cited case, this Court expressly determined it to be the duty of the trial court to rule upon both branches of a motion under Rule 50 (b) and to state its reasons underlying any grant of the new trial branch of the motion. Why the latter specific direction? Obviously, to inform the party against whom the new trial was ordered of the nature of the reasons for the grant and thus enable him to decide upon his future course of procedure. If they, or any of them, were discretionary in character, that would be the end of the matter. If they were solely asserted trial errors, however, the situation would call for an examination into the legal rectitude of the reasons and such further procedure as might be available for any desired determination thereof.

The party in the situation last described then turns to what this Court said in the *Montgomery Ward* case at p. 254:

> "Should the trial judge enter judgment n. o. v. and, in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for new trial would not *ordinarily* be *reviewable,* and only his action in entering judgment would be ground of *appeal.*" [Italics ours.]

This seems to fit his situation exactly. He assumes that the Court used advisedly and with intentional exactitude the words we have italicized. His is not the ordinary case where the reasons for the grant are, in part at least, dis-

cretionary in character. His is the rare and extraordinary case where the reasons are solely asserted trial errors,—matters of law. He notes the Court's citation of the leading authority on the subject, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 475. He concludes that the Court had that case in mind in using the word "ordinarily", because, although at p. 478 of its opinion in that case the Court said that the rule precluding a review of a grant of new trial for *error of fact* was settled by a long and unbroken line of decisions, the Court also said at p. 482 of the same opinion that under certain circumstances the appellate court *may inquire* into the action of the trial court on a motion for new trial. Consequently, coming to the conclusion that the judicially supposed trial errors are not such in truth and fact, he takes the above quoted language of this Court as his authority to appeal from the judgment and to seek a review therein of the legal questions involved in the new trial grant in the event the appellate court reverses the appealed judgment.

Then, when he reads the concluding sentence of the paragraph containing the above quotation from the *Montgomery Ward* case, viz., "If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial", he may be puzzled at first, but he concludes that the sentence must be read in the light of the entire paragraph of which it is a part and that, accordingly, this Court intended the word "ordinarily" to be read into it.

Petitioner's appeal was thus framed. We believe that this Court intends Rule 50 (b) to have such operative effect in its administration as to make possible a determination in a single appeal of all legal questions germane to a verdict and the judgment thereon. An appeal from the judgment n. o. v. satisfies the requirements of Judicial Code, §128 (a), 28 U. S. C. A. §225 (a). The question involved in a consideration of the appealed judgment goes right back

to the trial itself in determination of whether a case was made out and thus actually concerns the rectitude of the verdict and the judgment thereon. Asserted trial errors are likewise germane to the rectitude of the same verdict and judgment. In a proper case, all of these legal questions should be reviewable and determinable in a single appeal. The day of *Jarndyce and Jarndyce* is happily long since past. Enlightened and expeditious procedure is the goal of the Federal Rules.

Civil Procedure Rule 61 prohibits a trial court from interfering with a jury's verdict unless substantial justice requires it. How is this prohibition to be enforced in a case such as that at bar except by construing the operative effect of Rule 50 (b) in the manner for which we contend? When a trial court enters a judgment n. o. v. under that rule and also grants a new trial for asserted trial errors, it should know that its new trial order cannot become effective unless and until its judgment n. o. v. is reversed and its determination of the legal questions underlying the new trial grant have been found correct upon challenge. Certainly it should know better than to grant the new trial for the same reasons of law upon which it entered the judgment n. o. v., as the trial court did in the instant case, at least in large part.

Petitioner's appeal was entitled to a complete adjudication by the Circuit Court in its circumstances. Certiorari should be granted in the exercise of this Court's power of supervision, and petitioner's Question (3) should be determined by this Court.

(4) In the *Montgomery Ward* case this Court suggested and approved a cross-assignment of trial rulings by an appellee in an appellant's appeal,—this for the purpose of reaching and nullifying a judgment on a verdict if the appellate court reverses a judgment n. o. v. entered under

Rule 50 (b). Such a suggestion, though novel, is obviously in line with the Court's announced purpose in its promulgation of the rule and the manner in which the courts are admonished to administer it so as to accomplish all that is permissible under its terms. It speeds litigation and avoids unnecessary retrials and appeals.

If an appellee, in an appellant's appeal, may thus cross-assign trial rulings which he asserts *nullify* the judgment on the verdict, surely the appellant, in his own appeal, should have the same right to assign trial rulings which he asserts *justify* the judgment on the verdict. We believe, as we have hereinbefore argued, that he has and that this Court so intends. Indeed, his appeal itself is nothing else at its roots than an assertion that the trial ruling which refused his opponent's motion for a directed verdict was correct.

We plant ourselves firmly upon the truism that no man is entitled to more than one legally correct trial. We think that a determination of whether he has had it or not is the real objective of Rule 50 (b) and the permissible appeal from the trial court's entry of a judgment n. o. v. under that rule. It is the legal rectitude of the verdict that is the ultimate subject of inquiry. Consequently, our thesis is that a plaintiff having a verdict is entitled to its restoration if the appellate court, after a review of all trial rulings brought to its attention by both parties in an appeal from a judgment n. o. v. entered under Rule 50 (b), decides the verdict to find sufficient support in the evidence and to be free from trial error harmful to defendant. Petitioner's Question (4) should be determined by this Court upon certiorari.

(5) We well realize that petitioner has no absolute right to a full hearing and argument in this Court upon the merits of its appeal. But we know that this Court has a right

to make such an order if it so desires. In posing Question (5), therefore, petitioner simply asks the Court to determine whether, in the circumstances stated in the petition, it should exercise its right.

We submit that, upon the record, petitioner has been dealt a continuous course of injustice by the courts below since its verdict was returned. The Circuit Court below is obviously not in sympathy with this Court's exposition of the purpose, operative effect, and permissible scope of Rule 50 (b). It would be hard to prophesy the extent of further proceedings unless this Court exercises its prerogative to decide the whole case upon its merits. The state of the case is such as to make it susceptible of final determination here. The existence of petitioner's potential claim upon the Home Indemnity Company additional bond and the public character of petitioner's entity make it peculiarly in the public interest that this litigation be speedily determined. Although the record is necessarily voluminous, the ultimate questions are not difficult and should be settled without further delay. Justice delayed is justice denied.

We express, therefore, the hope than the Court will give special consideration to the prayer of the petition in this regard.

Respectfully submitted,

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